Big BROTHER?

AERIAL SURVEILLANCE REQUIRES A WARRANT.

WRITTEN BY **PIERRE GROSDIDIER**

IN *LEADERS OF A BEAUTIFUL STRUGGLE V. BALTIMORE POLICE DEPARTMENT,* the U.S. Court of Appeals for the 4th Circuit reversed a trial court decision and enjoined the Baltimore Police Department, or BPD, from proceeding with its pilot Aerial Investigation Research, or AIR, surveillance program.[1] The court held that because the program enabled authorities "to deduce from the whole of individuals' movements," accessing its data was a Fourth Amendment search that required a warrant.[2]

Under the AIR program, planes flying circles over Baltimore used powerful cameras to capture 32 square miles of the city "per image per second" during daytime, weather allowing. The imagery allowed the program's users to build a report of people and vehicle locations and movements before and after serious crimes. The imagery could be integrated with ground surveillance systems such as security cameras and license plate readers. The program intended to retain imagery for 45 days and investigative reports for as long as necessary.[3] Baltimore area grassroots community advocates who frequented crime scenes sued the BPD shortly before the pilot program started.[4]

Plaintiffs challenged the AIR program under the Fourth Amendment and asked the trial court to enjoin the BPD from proceeding with it. The trial court denied injunctive relief and the court of appeals affirmed in a split decision, but then granted an en banc rehearing. In the meantime, the pilot AIR program ended, and the BPD deleted all but 14.2% of the captured imagery, which was linked to live criminal investigations.

As an initial matter, the court denied the city's motion to dismiss on mootness grounds.[5] Even though the program had terminated, the BPD retained millions of photographs linked to opened investigations. Plaintiffs, who were likely to frequent crime scenes, might appear in the imagery and, therefore, retained a concrete personal interest in the dispute.[6]

The court then focused on the first of the four *Winter v. Natural Resources Defense Council* elements that a plaintiff must establish to obtain injunctive relief, namely the likelihood of success on the merits of the Fourth Amendment claim.[7]

The Fourth Amendment historically protected against unreasonable—and unwarranted—searches and seizures of homes and personal effects.[8] In its landmark 1967 *Katz v. United States* decision, in response to technology's encroachment into private lives, the U.S. Supreme Court extended the Fourth Amendment's aegis to situations where a person has a subjective expectation of privacy that society is willing to recognize as reasonable.[9] Under *Katz,* the court held that the police needed a warrant to record the private conversation of a person in a phone booth. Applying *Katz,* the U.S. Supreme Court recently held in *Carpenter v. United States* that obtaining cell-site location information, or CSLI, required a warrant because its ability to reconstruct a person's past movement through his or her phone signals invaded the person's reasonable expectation of privacy.[10]

The 4th Circuit held that "*Carpenter* applies squarely to this case" because "the AIR program 'tracks every movement' of every person outside in Baltimore," from which one may deduce more about the person's personal life than one ever could by observing individual trips.[11] These deductions, the court added, "go to the privacies of life, the epitome of information expected to be beyond the warrantless reach of the government."[12] These intrusions into a person's "associations and activities" infringe on the person's reasonable expectation of privacy.[13] The court held that because the AIR program tracked people much as CSLI does, accessing its data was a search and the program's warrantless operation violated the Fourth Amendment.[14] After briefly reviewing the other three *Winter* factors, the court concluded that plaintiffs' Fourth Amendment claim was likely to succeed on the merits, and it reversed and remanded. **TBJ**

NOTES

1. 2 F.4th 330, 333 (4th Cir. 2021) (en banc).
2. *Id.*
3. In practice, the AIR program retained most imagery indefinitely. *Id.* at 335–36 n.4.
4. *Id.* at 335.
5. *Id.* at 336.
6. *Id.* at 337.
7. *Id.* at 339; *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7 (2008). The other factors being the risk of irreparable harm absent relief, whether the balance of the equities favors relief, and whether relief is in the public's interest.
8. *Id.* at 339–40.
9. *Id.* at 340; *see Katz v. United States,* 389 U.S. 347 (1967).
10. *Id.* at 341 (citing *Carpenter v. United States,* --- U.S. ---, 138 S. Ct. 2206, 2213–23 (2018)).
11. *Id.*
12. *Id.* at 342.
13. *Id.* at 342, 346.
14. *Id.* at 346.

PIERRE GROSDIDIER is an attorney in Houston. He belongs to the first group of attorneys certified in construction law by the Texas Board of Legal Specialization in 2017. Grosdidier's practice also includes data privacy and unauthorized computer access issues and litigation. Prior to practicing law, he worked in the process control industry. Grosdidier holds a Ph.D. from Caltech and a J.D. from the University of Texas. He is a member of the State Bar of Texas, an AAA Panelist, a registered P.E. in Texas (inactive), a member of the Texas Bar Foundation, a fellow of the American Bar Foundation, and the State Bar of Texas Computer & Technology Section chair-elect for 2021-2022.